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The Challenge of Migration. Is Liberalism the Problem?

Karsten Schubert

Abstract: The challenge of developing humane migration and refugee politics in Western states is far from resolved. This ongoing failure is typically attributed to the increased influence of right-wing populism and neo-fascism in Western migration politics. In this article I discuss a more radical explanation: Christoph Menke argues that political liberalism and its framing of migration as an issue of subjective human rights is the deeper root of the problem. While the merit of Menke's approach is its criticism of subjectification through individual rights that blocks politics, I show that his *Critique of Rights* may lead to an anti-pluralist and paternalistic 'radical republicanism'. To react to this problem, I propose a 'reflective liberalism' that allows to criticise subjectification without abandoning the form of individual rights. This position, which I develop through a discussion of Foucault's concept of 'freedom as critique', shows that in addition to protecting minorities such as migrants, individual rights turn out to be part of a regime of critical subjectification that constitutes critical subjects. Such critical subjectification by law can help to break through the blockade of politics that prevent the development of humane migration and refugee politics.

I. Introduction

Europe's not taking action in order to protect refugees and migrants in European camps during the COVID-19 pandemic received little public outcry. While migration ceased to be in the centre of discursive attention, the challenge of developing humane migration politics is far from resolved. The ongoing failure of Western states to develop such politics is typically attributed to the increased influence of right-wing populism and neo-fascism in Western migration politics. In this article I discuss a more radical explanation: Liberalism is the deeper root of the problem. Not specific political parties and powers lead to inhumane politics, but the liberal form of individual rights that causes the framing of migration politics as a human rights issue is the very reason for the exclusion of refugees. Analysing both the merits and the shortcomings of this explanation, I propose a new concept of reflective liberalism that is based on individual rights while overcoming their negative effects. Instead of plainly following conventional human rights arguments or rejecting them altogether, reflective liberalism offers a productive framework for the development humane migration politics. This argument also entails the following position on the critique of existing political and legal institutions and forms: It is not helpful to totally reject them; they should rather be immanently reprogrammed and rebuilt for emancipative purposes.

While the critique of liberalism has a longstanding tradition in political theory, Christoph Menke's *Critique of Rights*¹ opens a new phase by combining the critique of liberal individual rights with an analysis of subjectification through liberal law. Menke employs this critique of liberal law to the problem of refugees and migration, bringing the continuous debate on the critique of human rights and their failure to protect refugees, which is mostly inspired by Arendt's analysis of stateless persons, to a new level of philosophical depth.² In what follows, I first reconstruct Menke's argument, explaining that the merit of his approach is to problematise subjectification through individual rights, which produces amoralist subjects and a depoliticised society. Following Foucault, subjectification means the constitution of subjects through power, which leads to potential repression and 'inner' unfreedom. In liberal subjectification it is the unfreedom of adhering to the liberal "Myth of the Given"³ that makes subjects conceptualise their individual will as natural and presocial. Following this myth, individual rights aim to protect the individual will from political interference and thereby block politics. Hence Menke calls for a radical, that is, unlimited re-politicisation. Secondly, I criticize Menke by pointing out that he dismisses the emancipative function of liberal individual rights too quickly and employs a universalist concept of political reason that is anti-pluralistic. He thereby opens a dangerous possibility of political paternalism, which is why I call his philosophy 'radical republicanism'. This leads to the question of how it is possible to criticize subjectification without falling into political paternalism. In the third step, I propose to answer this question by employing Michel Foucault's theory of subjectification and freedom. With Foucault it is possible to conceptualize a new reflective liberalism that can address the problem of subjectification while avoiding the pitfalls of paternalism, which amounts to a conceptual connection between freedom and critique; in short: freedom as critique. This notion of freedom as the capability to criticize one's own subjectification entails a demand for 'modal robustness', that is, its institutionalisation. Breaking with the anti-institutionalist anarchism that dominates Foucault scholarship makes possible the conception of an individual rights regime against paternalism that is not pathologically committed to the "myth of the given". This equidistance from Menke's call for radical politicisation through universal political reason on one hand, and from its opposite, Foucauldian anarchism on the other, makes reflective liberalism especially suitable for a realist conception of emancipatory politics in relation to existing political institutions. In the fourth concluding section I briefly sketch out how these foundational reflections on political theory help understand the challenge of developing humane migration policies.

II. Migration and Menke's Critique of Rights

Menke takes recourse to Hannah Arendt's famous critique of human rights, which she develops analysing the situation of stateless persons after the European wars. He connects Arendt's analysis with the situation of today's refugees and migrants, and thereby constructs

¹ Christoph Menke, *Critique of rights*, 2020, German original: Christoph Menke, *Kritik der Rechte*, 2015

² Christoph Menke, Zurück zu Hannah Arendt – die Flüchtlinge und die Krise der Menschenrechte, *Merkur* 70 (2016), 49–58

³ Menke (footnote 1), 118–19, 124, 145–46

the argument that it is liberalism which is the problem, more precisely an atomistic social ontology. Arendt shows that a general exclusion from society, that is, total rightlessness, is the fundamental problem of the stateless persons. Or, formulated positively, the necessary condition to enjoy the rights catalogued as ‘human rights’ consists of membership in a society. Arendt calls this necessary condition ‘the right to have rights’, that is, a right to membership in human society. Following Aristotelian social ontology, Arendt explains human beings are *zoon politikon*, intrinsically social beings. This is why excluding a human being from human society is a dehumanising act, and the inclusion into human society is the fundamental human right.⁴ Drawing on this social ontology, Menke points out a contradiction between conceiving human beings as intrinsically social and the very idea of individual human rights. Individual subjective human rights are the product of liberal political philosophy, which conceptualizes human beings in an atomistic social ontology, defining them as individuals with a natural will, which is fundamentally different from the Aristotelian holistic social ontology.⁵

Menke claims that through this Aristotelian social ontology, Arendt radically changes the dominant debate about refugees. This debate is posing the human rights of the individuals (idealising camp) against the interests of the group (realist camp) and reflects on the question of how much a certain group (mostly constructed as national states) owes to certain individuals⁶, because it is confined by the premises of liberalism. The concept of the right to have rights points out, according to Menke, that the refugee is always already a member of society. The liberal framework rejects this membership, because it rejects the very idea of membership, as it treats human beings as atomized individuals, instead of as social beings who are defined by their very membership. While the liberal debate about rights frames the problem as denying the refugee something that ‘we’ have (for example, the right to be ‘integrated’ in ‘our’ society), Menke claims that the denial is more general. Liberal societies do not even give ‘real’ membership to their own members, because they are based on the idea of individual rights (Menke 2016, 57).

Migration politics receives that much populist attention and political cleavage, according to Menke, because it puts in question our very identity, bringing into question who we are. We are, currently, liberals who only act according to a catalogue of human rights, which are effectively linked to national civil rights – regardless of the evolvement of the international human rights framework. We do not act following the right to have rights, that is, seeing and treating everybody as a member of human society. Menke’s assessment of the situation is clear: We have to escape our liberalism if we really want to change our policies regarding refugees and migration.

In *Critique of Rights* (2020, German 2015) Menke elaborates on the problem of liberalism and its form of individual rights in greater detail. According to Menke, individual

⁴ Cf. Hannah Arendt, Es gibt nur ein einziges Menschenrecht, *Die Wandlung* 4 (1949), 754–770, 759 ff.

⁵ For the distinction between an atomistic and a holistic social ontology see Charles Taylor, *Cross-Purposes, in Liberalism and the Moral Life*, ed. Nancy Rosenblum, 1989, 159–182, who develops these concepts to structure and clarify the debate between liberalism and communitarianism in the American political theory community.

⁶ Cf. Menke (footnote 2), 55.

rights are the foundation of modern societies, which have invented the specific liberal form of individual rights. While ancient and Roman law was thought to express justice, reasonable order, and ethical life, in modernity the will of individuals becomes the philosophical foundation of law.⁷ The individual will is understood as a pre-social force of nature and individual freedom, and modern law aims at the recognition and protection of this nature. Therefore, modern law is based on individual rights, and individual rights are “(juridical) claims to (natural) claims, the juridical authorisation of natural power.”⁸ The form of modern individual rights completely revolutionizes the relationship between norm and nature and puts nature in the foreground.⁹ Natural rights are now primary to law; the ‘objective right’ is set up in order to secure ‘individual right’.¹⁰

This modern primacy of rights has fundamental effects on society, as it changes the self-conception of human beings – and it determines who we are today. While liberalism’s natural law tradition views the autonomous subject as the ground for individual rights, Menke critically turns the relationship of causation around through a quasi-genealogical analysis: We do not have the liberal order to secure our freedom and our natural, individual will, as classical liberalism argues, but we see ourselves as individual subjects only because of the liberal legal order. This is subjectification by law. The autonomous and individual subject, freed from normative reasoning through individual rights, is the product of the primacy of rights in liberal law. As this critique of subjectification is central to Menke’s argument, his *Critique of Rights* owes way more to Foucault’s thinking than the rather short explicit discussion of Foucault in the book would suggest. By protecting the individual will from political influence, the liberal law creates the “morally indifferent self-will”¹¹, and thus leads to an amoral society without normative reasons. The private will of the subject is protected from the interference of politics and ethics. Because the will does not have to justify itself, politics is blocked as a process of justification; bourgeois society is a depoliticized society deprived of ethical life.¹²

At the same time, according to Menke, modern law has the historical chance of reflexivity and emancipation – which it forfeits, however, because it is only realized in its bourgeois form of decay, subjectifying people to think their will as natural and independent of society and politics. Modern law is, according to Menke, fundamentally reflexive because

⁷ Menke (footnote 1), 32. The following discussion of Menke’s *Critique of Rights* is based on research that I also draw upon to discuss institutions in post-foundationalist and post-marxist political theory, cf. Karsten Schubert, *Institutionalisierung der Freiheit im Recht*, in *Institutionen des Politischen*, ed. Steffen K. Herrmann / Matthias Flatscher, 2020, 351–378.

⁸ Menke (footnote 1), 37

⁹ Menke (footnote 1), 24

¹⁰ The very difference between ‘das Recht’ und ‘einem Recht’, between ‘law’ as the legal order and ‘rights’ as individual claims, is a modern invention and can be dated back to Wilhelm von Ockham (approx. 1288–1347), and is already taken for granted by Thomas Hobbes (1588–1679). The term “subjektives Recht” (right) in difference to “objektives Recht” (law) is used to make this distinction explicit, given that both concepts are signified by the same word “Recht” Menke (footnote 1), 9 ff.

¹¹ Menke (footnote 1), 191

¹² Menke (footnote 1), 259

it makes manifest the gulf between law and non-law for the first time. In traditional law, the gulf between law and non-law was reconciled in a higher order and unity (nature in ancient law, reason in Roman law), i. e. by a fundamentalist conception that makes the arbitrariness of law invisible. The innovation of modern law is that it highlights and reflects its own loophole. The reflection of the paradoxical relation of nature and law is modern law's way out of traditionalist fundamentalism. In other words: Modern law knows that there is no legality and morality given in nature (as it was believed in Roman and ancient law), and therefore opens the possibility of reflecting on this unfoundedness. Reflexive modern law sees itself in interaction with non-law, it can conceptualize that it can itself have negative effects on society – for example, that a certain liberal legal and property system leads to impoverishment – and it can respond to such effects. Within this framework, complex legal mechanisms of proceduralisation and democratic control are established.¹³

Menke's criticism of modern law, however, is that its reflexivity is only conceptual or potential; the only *realized* form of modern law is bourgeois law, which blocks this reflexivity. It does so by essentialising nature through law, which is the opposite of an understanding of the relationship between law and nature as dialectic. Instead of reflecting on how it constitutes subjects – the processes of subjectification through law as Foucault would call it – law's subjectification works through the neglect of its own effects by conceptualising subjects with a natural, pre-social, and unchangeable will and interest. Menke calls this "empiricism or positivism" and, in reference to Wilfrid Sellars, the "Myth of the Given".¹⁴ The fundamental problem of this positivism, according to Menke, is that the subject, which law creates by aiming at the protection of its will and interest, is an amoralistic subject without normative reason, just like the liberal-bourgeois society.¹⁵ The ontological innovation (and failure) of bourgeois law consists in creating a radically selfish and antisocial society based exclusively on the private will of individuals. The innovation is that individual will is not tested against political normativity, as in traditional law. The private will of the subject is protected against politics and ethics. Because the will does not have to justify itself, politics as a process of justification is blocked; the bourgeois society is a depoliticized society.¹⁶ Property rights are the main form of individual rights that depoliticise in this way; they are rights to the exclusion of others, enforced not only against other individuals but against ethics and reason altogether. The essence of property is to be free from normative and political demands regarding the use of the property.¹⁷ The bourgeois de-

¹³ Cf. Menke (footnote 1), 95 ff. Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, *Rechtshistorisches Journal* 9 (1990), 176–220 is an explanation of this process: Through the constitution law can be structurally coupled with politics, which enables the institutionalization of change in law, thus the capability to react to political struggles and social changes.

¹⁴ Menke (footnote 1), 123, 145

¹⁵ Cf. Menke (footnote 1), 144–147, 180–181.

¹⁶ Cf. Menke (footnote 1), 259

¹⁷ Cf. Menke (footnote 1), 149 ff. Even social rights, normally positioned against liberal rights, are based on the paradigm of subjective rights according to Menke, as they shall guarantee the capability of individuals to follow their free will, cf. Menke (footnote 1), 153 ff. Liberal demands for extensive property rights and the reaction of 'socialist'

politicisation and “de-moralization” (*Entsittlichung*)¹⁸ works by establishing the difference between bourgeois society (as pre-political) and politics, limiting politics to the securing of individual rights.¹⁹ Politics as a communal decision-making process is thus rendered impossible because no political will can be developed against the private will.

The final chapter of Menke’s monograph is devoted to developing a new concept of law that allows to overcome the bourgeois-liberal pathology of depoliticisation. This concept is a re-politicised “new right” with counter-rights based on participation. The new right is intended to enable a re-politicisation of the individual will and democratic participation while avoiding the pitfalls of political paternalism. Menke works through the problem of paternalism under the keyword “communism”, by which he means a political self-determination of the community that is total and leaves no room for individual passivity – in communism, there is only politics. Herein lies an obvious – and rather classical – problem: Total democratic control and total politicisation can lead to paternalism. Individuals and minorities might be forced to adapt to society. In contrast to (total democratic and paternalistic) communism, the new right is supposed to enable political self-determination and at the same time allow passivity, which is secured by counter-rights. The difference between liberal individual rights and counter-rights is that the latter are not rights to a naturalized individual will and its protection from political influence, but rights to the consideration of the perceptible and passivity in the process of political judgment. Since it abandons the concept of a private will and interest in a pre-political realm of the social that has to be protected against political influence, the new right opens up and supports the possibility for real political change; the political control of the social without predetermined (ideologically bourgeois) limits.

I would like to point out that the central insight of Menke’s theory is the connection of the critique of law with the theory of subjectification. Subjectivity and individual will are not pre-social, but consist of the result of subjectification in a particular society – in modern, bourgeois liberalism, this is subjectification based on individual rights. It constitutes individuals who feel and think that it is natural to live a life of bourgeois amoral separation and who believe that any interference with their private and economic lives consists of paternalism. This is a critique of classical political liberalism and its negative concept of freedom. The question is whether this negative concept of freedom and the blindness towards subjectification can be overcome without making the nightmare of liberalism – a paternalistic society – come true.

III. Menke’s Deadlock: Radical Republicanism or Classic Liberalism

My criticism of Menke is that he does not succeed in solving this challenge, because the counter-rights do not provide sufficient protection against political paternalism. In other

demands for social rights are the bourgeois circle of intensification of government. Liberal rights produce social problems, which create the need for social rights, which produce paternalism, that creates the need for liberal rights, and the circle begins again. It is, however, not clear why this circle is an intensification, cf. Menke (footnote 1), 174–177, 202–212.

¹⁸ Menke (footnote 1), 228

¹⁹ Cf. Menke (footnote 1), 228 f., 232 f.

words, Menke's aim is to overcome the difference in political theory between a liberal and republican position, where the liberal position insists on universal rights of the individual and the republican position focuses on the political self-determination of the community.²⁰ But either, following a strong reading, the new right leads to radical republicanism that overrides the individual will through total politicisation, or, following a weaker interpretation, Menke's counter-rights remain structurally identical with the liberal individual rights, and his conception cannot escape the liberal framework it aims to overcome.

1. Strong reading: Radical republicanism. According to Menke, the problem is that the form of individual rights creates the individual private will, which is secured against political and social control and thereby set independent of it – individual rights create “the positive capacity for moral indifference”.²¹ He calls this “de-moralization” or “Entsittlichung”. Against this, he argues for political control, which is not conceptually limited by privacy. This is a dangerous path, as it ignores the massive problem of paternalism through limitless politics. Many political achievements of minorities are secured by rights, using the liberal form of individual rights to demand protection from repressive and normalising politics. For example, important steps for the protection of the human rights to sexual self-determination were shaped by the right to privacy of the International Covenant on Civil and Political Rights in the *Toonen vs. Australia* decision in 1994, which allowed consensual private gay sex.²² From a queer perspective, Menke's vision of a completely political society without secure private spheres appears threatening, because uniform normalisation instead of diversity is to be expected in such a society. In short: From a minority perspective, individual rights are a central political tool and it is not surprising that the radical and fundamental critique of such rights is not developed from the perspective of minority struggles, but rather through an abstract and universal philosophical analysis.²³

²⁰ A goal he shares with Jürgen Habermas, despite the deep differences in philosophical methods and proposals for solution. Cf. Jürgen Habermas, *Drei normative Modelle der Demokratie*, in *Die Einbeziehung des Anderen*, 1996, 277–292; and Jürgen Habermas, *Zur Legitimation durch Menschenrechte*, in *Die postnationale Konstellation*, 2001, 170–192.

²¹ Menke (footnote 1), 181

²² Cf. Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, (31.03.1994), on the historical genesis, the current state and problems of the international human rights framework with regard to sexual orientation and gender identity see Karsten Schubert, *Langer Weg zur sexuellen Selbstbestimmung*, *Vereinte Nationen* 61 (2013), 216–222.

²³ Here theoretical-political history repeats itself: From the US perspective Menke's criticism easily appears as a more sophisticated version of Critical Legal Studies (CLS), which offered radical legal critique from a Marxist perspective Peter Fitzpatrick (ed.), *Critical legal studies*, 1990; James Boyle (ed.), *Critical legal studies*, 1992. CLS was criticized by the Critical Race Theory because it reduces all politics to class struggle and ideology (Menke's equivalent would be “form of subjective rights”), which makes CLS unable to recognize the importance of legal struggles in the fight against racism, see Patricia J. Williams, *The Alchemy of Race and Rights*, 1991; Nikol G. Alexandei Floyd, *Critical Race Black Feminism: A “Jurisprudence of Resistance” and the Transformation of the Academy*, *Signs: Journal of Women in Culture and Society* 35 (2010), 810–820.

To formulate it more systematically, the problem of radical republicanism is that it is structurally anti-pluralistic, since it is based on a universalist concept of political reason and ignores political conflict. Against Lefort, Gauchet, Rawls, and implicitly all the theorists who work on post-foundational political thought and political difference,²⁴ Menke insists that politics is about (universalistic) reason that is set against (particularistic) individuality.²⁵ According to Menke, reason is not only another particularity that has managed to become dominant through political struggles for hegemony, but the category of universalist political reason really exists and stands against individuality. This idealism is the opposite of a conflict-based political ontology, as it underlies the debate on the political and on post-fundamentalism, and also Foucault's thinking of freedom.²⁶ Assuming universalistic reason and ignoring pluralism is the philosophical basis for treating the problem of paternalistic normalisation as secondary and totalising politics in relation to law. If, on the other hand, a pluralistic and conflictual political ontology with a perspectivist concept of reason is the starting point, it is possible to focus on a problem that Menke's universalism blends out, namely how can political deliberation function without leading to paternalistic normalisation.²⁷ It is precisely this problem that radical theories of democracy deal with, such as the approach of freedom as critique, which I present in the following section.²⁸

2. Weak reading: Counter-rights as protection. Since the radical republican reading leads to paternalism, I will now discuss a *prima facie* more attractive, weaker reading. At its

²⁴ See Claude Lefort / Marcel Gauchet, *Über die Demokratie: Das Politische und die Instituierung des Gesellschaftlichen*, in *Autonome Gesellschaft und libertäre Demokratie*, ed. Ulrich Rödel, 1990, 89–122; John Rawls, *Political liberalism*, 2005; Ernesto Laclau / Chantal Mouffe, *Hegemony and socialist strategy*, 2001; Chantal Mouffe, *On the political*, 2008; Judith Butler / Ernesto Laclau / Slavoj Žižek, *Contingency, hegemony, universality, Contemporary dialogues on the left*, 2000; Jacques Rancière, *Disagreement*, 1999; Oliver Marchart, *Die politische Differenz*, 2011.

²⁵ “The obtainment of universality, however, is nothing else but a process of reason. Particular individuality, overwhelmed by each particular political decision, can only be non-rational individuality: individuality against political reason” (Menke (footnote 1), 261).

²⁶ Cf. Karsten Schubert, *Der letzte Universalismus. Kontingenz, Konflikt und normative Demokratietheorie*, in *Das Politische (in) der politischen Theorie*, ed. Oliver Flügel-Martinsen / Franziska Martinsen / Martin Saar, 2021 (forthcoming), also online as Karsten Schubert, *Der letzte Universalismus. Kontingenz, Konflikt und normative Demokratietheorie*. <<https://philosophie-indebate.de/2995/schwerpunktbeitrag-der-letzte-universalismus-kontingenz-konflikt-und-normative-demokratietheorie/>>, accessed 17-11-19 10:21.

²⁷ There is a remarkable similarity between Isaiah Berlin and Foucault's liberalism. Berlin too analyses the structural paternalism of theories by which intellectuals set out to philosophically define what is good and right and at the same time explain the (un)freedom of those who disagree, in order to then ‘liberate’ them using coercive means, see Isaiah Berlin, *Two Concepts of Liberty*, in *Liberty*, ed. Henry Hardy / Ian Harris, 2002, 166–217. Foucault shares this concern and develops his genealogical method to avoid such paternalism.

²⁸ See in this context also my proposal for a radical politicisation based on a particularist political ontology and perspectivist epistemology in Karsten Schubert, “Political Correctness” als Sklavenmoral? Zur politischen Theorie der Privilegienkritik, *Leviathan* 48/1 (2020a), 29–51.

core is Menke's proposal to overcome the difference between liberalism and republicanism through the new right and counter-rights. The counter-rights are intended to protect and enable non-participation in a generally communist conception of politics that equates freedom with political participation. They are supposed to put a stop to the paternalistic total politicisation, which I highlighted as the problem of the strong, that is, radical republican reading. However, it remains unclear to what extent the counter-rights really differ systematically from the liberal form of individual rights. While bourgeois individual rights essentialize passivity (the perceptible) as a right and oppose it to political judgment, the counter-rights affirm passivity, suffering and the perceptible by making it the starting point for political judgment.²⁹ The best way to explain what could be meant by this, is a political process of developing policy that protects minorities, for example the development of a political position (judgment) which does not discriminate against gays by taking into account the suffering from past discrimination (perceptible feeling). However, the incorporation of perceptible feelings into judgment shall not essentialize them, but include the feelings into the political process and deliberate on them. The problem is again an oscillation between two possible interpretations: If there is no conceptual limit to the debates on the perceptible in politics, but political judgment has the power to define which perceptible feelings are to be considered and included and which are not, then the position amounts to radical republicanism and does not help in preventing its paternalism. Thus, in the framework of homophobic political 'reason', the suffering of homophobia could be judged as a perceptible feeling that is a completely unproblematic side effect of good political education for the 'correct' lifestyle and therefore does not need to be considered in political judgment. If, on the other hand, there is a limit to the politicisation of the perceptible, then the position does not differ conceptually from bourgeois-liberal law, whose essence, according to Menke, is to set the perceptible free from political judgment.

These problems become even more complicated when one considers that not only does the perceptible influence judgment, but vice versa, that judgment influences the perceptible.³⁰ Another question that Menke leaves open is how exactly the difference between the perceptible and judgment can be understood: In political struggles, the two typically mix. What, for example, is the status of the religious perceptible affect, which is clearly not just a physical affect, but a whole world view full of judgments. Another problem is that constructing the concept of counter-rights on the perceptible can lead to arguments based on an essentialist biologism, e. g. about the "nature" of "men" and "women" regarding the distribution of social obligations and privileges. The struggle for sexual self-determination is a good example of the problem of essentialising strategies. U. S.-American gays claim that they were born gay (biologically essentialist) to defend themselves against homophobic charges that homosexuality was an immoral lifestyle and therefore a free choice. But this "born-that-way" argument does not attack the assertion of immorality at all; thus, it is merely defensive and, moreover, does not protect against biotechnological modifications of

²⁹ Cf. Menke (footnote 1), 276–278.

³⁰ Cf. Martha C. Nussbaum, Constructing Love, Desire, and Care, in *Sex, Preference, and Family: Essays on Law and Nature*, ed. Martha C. Nussbaum / David M. Estlund, 1997, 17–43.

sexual orientation when these become available.³¹ If individuals may only bring their perceptible into political judgment, the politics that follow are structurally conservative.

Systematically, this boils down to a general problem of conceptualising the perceptible as the basis of politics: It is anti-pluralistic. Taking perceptible feelings into account in politics is a much weaker protection than allowing a plurality of (amoral) individual wishes. For perceptible feelings are incorporated into universalistic reason and evaluated by it, whereas what is necessary is a protection of a plurality of reasons. Conceiving a plurality of reasons in a political community is conceptualized in political liberalism by the distinction of (universalistic) morality and (particular) ethics.³²

In conclusion, radical republicanism is problematic, and counter-rights can only prevent a relapse into radical republicanism if they are conceptual like individual rights, not only bringing the perceptible into political judgment, but also protecting arbitrary judgment (of individual will and ethics) against political judgment. Menke does not resolve the tension between liberalism and republicanism, between law and politics, between the perceptible and judgment. The concept of the new right is a deadlock, stuck between classic liberalism and radical republicanism.

This critique opens the possibility to ask less radically and more realistically which individual rights are helpful for refugees and where politics is problematically blocked through the language of rights and its liberal subjectification. Furthermore, having pointed out that the central merit of Menke's approach is the theory of legal subjectification and the central problem is its paternalistic anti-pluralism, it is now possible to ask how the problem of subjectification can be tackled without falling into anti-pluralism and paternalism. In other words: Can there be a pluralist, that is, liberal way to address the problem of subjectification?

IV. Foucault's Freedom as Critique

Using the Foucauldian notion of freedom as critique, it becomes possible to conceptualize what Menke's project aims at but cannot realize because of the deadlock I discussed: to resolve the tension between liberalism and republicanism, law and politics, and to conceive of a critique of liberal rights that criticises the inner unfreedom of subjects and their subjectification through law and yet is not paternalistic. Conceiving the problem as related to the concepts of freedom is key, as the unproductive alternative of classical liberalism and radical republicanism, in which Menke is stuck, is conditioned by the two associated concepts of freedom: on the one hand, the classically negative concept of freedom, which Menke sees at the core of individual rights, and whose depoliticising effects he so aptly criticises. And on the other hand, the positive concept of freedom, that is rooted in a

³¹ Cf. Edward Stein, *Born That Way? Not A Choice?: Problems with Biological and Psychological Arguments for Gay Rights*, 2008; Edward Stein, Sexual Orientations, Rights, and the Body: Immutability, Essentialism, and Nativism, *social research* 78 (2011), 633–658.

³² Cf. Jürgen Habermas, *Faktizität und Geltung*, 1992; Rainer Forst, Ethik und Moral, in *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit*, ed. Lutz Wingert / Klaus Günther, 2001, 344–371; Michel Rosenfeld, *Law, justice, democracy, and the clash of cultures*, 2011.

republican holistic social ontology following Hegel and Arendt, according to which freedom is equated with participation in community self-government. With freedom as critique, a concept in equidistance to the negative and positive concepts of freedom is now available. It offers a critique of individual rights just as radical as Menke's, namely a critique of their subjectification following the "myth of the given". And this without producing the usual costs: potentially unbridled political paternalism. For while the critique of subjectifications is itself a specific subjectification that always has a particular political content and is thus potentially paternalistic, freedom as critique aims at equipping individuals with the capability of a critique of subjectification. The core of the critical subjectification that follows from freedom as critique is the empowerment of individuals to the ever-increasing critique of subjectification, making this critical subjectification regime of critique the least paternalistic form of subjectification critique possible.³³

Central to this position is a nuanced conception of subjectification through law that can account for the institutional and legal conditions of critical-political subjectivity that Menke unquestioningly presupposes. Menke interprets subjectification in a purely repressive way and therefore cannot conceive of it as a condition of the possibility of politics. In contrast, freedom as critique shows that critical subjects, who are the drivers of emancipatory politics, are only constituted through critical subjectification. And individual rights are one way of institutionalising critical subjectification. I call this position 'reflective liberalism' as it is based on individual rights and allows the reflective critique of their potentially repressive subjectification.

I now describe – very schematically – the structure of the argument for freedom as a critique. The following steps of argumentation are the result of a reconstruction and critique of the social-philosophical debate on Foucault's concept of freedom, which is the flesh of my monograph *Freiheit als Kritik Sozialphilosophie nach Foucault*³⁴. For the sake of systematic conciseness, I will limit myself here to the argumentative skeleton.

Subjectification means that subjects are constituted by power. Power is productive because it enables subjects to think and act; this means, however, that there are no characteristics of the subject that can be said with certainty not to have been instantiated by power in the process of subjectification. In particular, no demanding capabilities can be assumed to be prior to subjectification. Subjectification is not passive suffering of the subject, but an

³³ That is why I also call freedom as critique "the last universalism" in post-fundamentalism, see Schubert (footnote 26).

³⁴ Karsten Schubert, *Freiheit als Kritik*, 2018a. There I examine four different strategies of interpreting Foucault's work in relation to the problem of freedom, using exemplary texts representative of these strategies, and derive the concept of freedom as critique through an internal critique of these texts. The four strategies and their representatives are 1. Foucault is coherent (Paul Patton, Taylor and Foucault on Power and Freedom, *Political Studies* 37 (1989), 260–276), 2. Foucault corrects himself (Thomas Lemke, *Eine Kritik der politischen Vernunft*, 1997), 3. Foucault criticizes coherently (Martin Saar, *Genealogie als Kritik*, 2007), 4. Foucault is not enough (Amy Allen, *The Politics of Our Selves*, 2008). This section of the present article is based on the chapter "Das Argument" in *Freiheit als Kritik*, pp. 305–312. For an extended discussion in English of freedom as critique see Karsten Schubert, Freedom as Critique. Foucault Beyond Anarchism, *Philosophy & Social Criticism* (2020b), 1–26.

active process of subjectifying oneself. However, the self-technologies used for this purpose are also suspected of not being formed by the subject itself, but rather instantiated by power. Subjectification is a problem of freedom because it leads to the well-founded suspicion that subjects are much more heteronomous than is generally assumed. This situation poses a problem for the concept of freedom: freedom can no longer consist negatively in non-interference as there is no own and inner core of the subject, which would be exempt from the suspicion of being produced by power. Nor can freedom positively consist in the simple acceptance of and recognition through power, because it often has subjugating effects.³⁵ According to Foucault, power is productive, yet this leaves open whether its productive effects are repressive or liberating.³⁶ The problem of subjectification consists of the question of how freedom can be conceived in this equidistant position from the negative and positive concept.

Freedom in relation to the problem of subjectification means the capability to reflectively criticize one's own subjectification.³⁷ This capability makes it possible to deal with subjectification as a problem of freedom. It is a higher-level reflection than the first-order reflection created by subjectification, that can allow the transcendence of the reflection instantiated by subjectification. In other words, it is a particular self-technology whose operation is the reflection of the potential heteronomy of all self-technologies. Although freedom as critique is also dependent on subjectification – wherefore 'absolute' freedom or freedom as a fixed status is impossible – as a movement that always aims beyond itself, it achieves as much distance and independence from subjectification as possible. It is an internalized, constant hermeneutics of suspicion that always critically examines everything, including itself. In doing so, it does not come to a standstill, but proceeds from critical operation to critical operation; it is therefore a practice (and not a status or condition), but still depends on capabilities.

³⁵ This problem of freedom was formulated regarding Foucault's archaeological and genealogical phase, in the works Michel Foucault, *Madness and civilization*, 1988; *The order of things*, 1970; *Orders of discourse*, *Social Science Information* 10 (1971), 7–30; *Discipline and punish*, 1977. Extensive references to secondary literature on the interpretation of Foucault's position and on the construction of the problem of freedom and the concept of freedom can be found in Schubert (footnote 34).

³⁶ Foucault developed the concept of productive power in Foucault (footnote 35) and Michel Foucault, *The history of sexuality*, 1978; the ambivalence of productive power was discussed particularly with regard to Foucault's lectures on governmentality Michel Foucault, *Security, territory, population*, *Lectures at the Collège de France*, 1977–78 (ed. Michel Senellart), 2007; *The birth of biopolitics*, *Lectures at the Collège de France*, 1978–79 (ed. Michel Senellart), 2010.

³⁷ This concept of freedom is articulated in Foucault's late reflections on his method of genealogical criticism, among others in Michel Foucault, *What is Critique?*, in *The Politics of Truth*, 1997, 41–81; *What is Enlightenment?*, in *The Politics of Truth*, 1997, 101–134; see also Judith Butler, *What is Critique?*, in *The political*, ed. David Ingram, 2002, 212–226. Criticising the widespread Foucault reception, I point out that the concept of freedom as critique is completely different from the ethical concept of freedom in Foucault's late work on antiquity, cf. Karsten Schubert, *Die christlichen Wurzeln der Kritik. Wie Foucaults Analysen der Kirchenväter neues Licht auf die Debatte um Macht und Freiheit werfen*, *ZfPhL* 7 (2019), 60–71.

Through this operation of critique, this work on oneself, a subject can transform and emancipate itself from the subjectifications that have constituted it; it can thus develop independence and actual autonomy from the external power that constituted it. Something new is created that cannot be accounted to power. Freedom is an emergent level of operation in relation to the subjectifications that have constituted the subject: inner-psychic emergence. How exactly the new comes into the world cannot be predicted, but it can be said that this kind of inner-psychic emergence is more likely to occur through critical subjectifications.

As a capability dependent on complex conditions, freedom as critique cannot be assumed presocially in the subject. Rather, subjectification theory suggests that freedom as critique should be understood as a result of subjectification – because the capabilities of the subject are instantiated by power in the process of subjectification. A paradigmatic case of such a liberal or critical subjectification is the genealogical critique, which encourages its readers to critically reflect on their own subjectification.

However, stating the general possibility of freedom (through social criticism), the problem of subjectification is not yet solved, but only postponed. That freedom as critique is generally possible is correct, but as a result of the problematisation of freedom it is unsatisfactory. For stating the general possibility of freedom cannot be regarded as a solution to this problem of freedom, at the heart of which lies the well-founded fear that we are much less free than we think. If one is satisfied with the statement “freedom is possible”, one must suspend the hermeneutics of suspicion – which is contradictory since it is essential in a Foucauldian understanding of power and freedom. In short, one loses sight of the problem as a social-philosophical one, if one is satisfied with statements in the modality of general possibility, because they are not an adequate answer to the well-founded fear of extensive subjectification through power. To state the general possibility in this way is too unspecific. This only clarifies that free subjectification as social criticism is always possible, but does not make any further statement about the conditions of its probability.

An adequate answer lies in the change of modalities: Not general statements of possibility, but distinctions of different probabilities are necessary. Accordingly, the identification of such social situations, in which critical subjectification is more likely to occur, can be considered a solution to the problem of subjectification. The aim is thus to identify modally robust practices with respect to critical subjectification, that is, those practices that are highly likely to subjectify critically under different circumstances. Such modally robust practices of subjectification can also be called subjectification regimes. The necessity of identifying regimes of critical subjectification also derives from the long-term effects of subjectification described above: Only if the critique of power that has liberating effects is iterated and works over an extended period it can be assumed that subjects develop the capability of freedom as critique. For this reason alone it is insufficient for the concept of freedom to state that critical subjectification is always possible, as such a statement does not rule out that it only appears occasionally and by chance. This “argument from modal robustness” is the crucial step of my argumentation beyond the existing literature on

Foucault.³⁸ It leads to the necessity of transforming the problem of freedom into a question of the institutionalisation of critical subjectification.

An obvious argument against this idea would show that freedom should not be located in the often repressive regimes of subjectification of political and legal institutions but in subjectification regimes of protest and subcultures. Thus, for example, queer critique of heteronormativity and the counter-hegemonic identities it creates, which subversively rewrite ‘normality’, can be examined as a prime example of critical subjectification. Accordingly, many Foucauldians, such as Amy Allen,³⁹ argue for such localisation of freedom in protest culture.

But such a location of freedom in a specific political project does not do justice to the proceduralist and conflictual character of freedom. When freedom is established as a particular ethical-political project, it loses its conceptual core of ever-increasing hyper-reflection, and it is suggested that the specific ethical-political subjectification that has been labelled good by the ethical-political theory of freedom is undisputed and universal. However, this is an inadmissible argument in the context of Foucault’s post-foundationalist framework. The hermeneutics of suspicion underlying freedom as critique assume that any particular thick theory of freedom can easily turn into repression. Therefore, it makes sense not only to locate freedom in protest movements but also to transform the question into a democratic-theoretical one, in which the problem of the potentially paternalistic norm-setting of ethical-political projects, that is, the contested nature of freedom, can be dealt with. This argument goes beyond Foucault’s partly anarchist commitments and reframes the concept of freedom as critique as a matter of normative political theory.

This first argument for locating freedom in democratic institutions is derived from the formal logic of freedom as critique, and it could be contradicted by conceptualising protest movements in such a reflective way that they are resistant against turning into repression, while at the same time arguing that political institutions are fundamentally repressive – Rancière calls them “police” for this reason.⁴⁰ However, if one reconstructs the concept of freedom by means of immanent critique as a normative value of late modernity⁴¹ and thus establishes the goal of realising society-wide freedom, then the focus on (one’s own) political protest movement is not sufficient, but the general institutional design of society necessarily moves into focus.

To sum up: If one combines this demand for universalisation that is contained in the normative concept of freedom with the requirements of modal robustness and the definition of freedom as critique as a formal principle of constant critical reflection against (political) normalisation, it follows that critical reflection should be practiced permanently and on a society-wide basis (and not only in political movements), because only in this way freedom for all is likely. Therefore, the danger that the establishment of such a freedom

³⁸ I develop the argument from modal robustness in detail through a discussion of Foucault’s *The Subject and Power* and how it is falsely seen as a solution to the problem of freedom by many Foucauldians in Schubert 2020b (footnote 34).

³⁹ Allen (footnote 34)

⁴⁰ Cf. Rancière (footnote 24).

⁴¹ Cf. Allen (footnote 34).

regime could itself have repressive effects cannot be ruled out but only adequately processed – through the constant self-suspicion of the hermeneutics of suspicion.

Referring to the liberal distinction between morality and ethics, freedom should be placed at the level of morality, that is, it should be anchored in the general institutional design of society. Here, freedom as critique has the function of working in two directions: On the one hand, it demands self-reflective and self-critical political institutions that are open to change because the hermeneutics of suspicion is particularly vigilant against claims to political universalisation and the political paternalism that might go hand in hand with it. On the other hand, it demands the establishment of such regimes of subjectification that aim to instantiate freedom as critique in all subjects. Freedom as critique should thereby have an effect on all ethical-political projects and give its members the ability to take a critical stance on these ethical-political regimes of subjectification.

The always also arbitrary ethical-political determination of freedom can only be countered by further critical processing. The initiative and the energy for this further processing come from the individuals who transform themselves and thereby also criticize and change the institutions that subjectivize them. That they do so is more likely if they have been subjectified in terms of critique; from the perspective of freedom as critique, the dynamics of the institutions can thus be generated by the institutions themselves. And yet – and this is the decisive factor here, which is why I also call this a liberal reading of Foucault – criticism remains a matter of individuals.

Freedom as critique achieves what Menke aims at: the repoliticisation of the individual will. It aims at freedom from repressive subjectification, such as the subjectification through the liberal myth of the given, and therefore politically interferes with the individual will through critical subjectification. It thus overcomes liberalism's boundary of the naturalized individual will, that is, its attachment to a negative concept of freedom, which causes the pathological depoliticisation of liberal societies. Nevertheless, the repoliticisation through freedom as critique does not suffer from the danger of political paternalism in the way Menke's new right does for two reasons. First, as it is not aimed at politicisation per se – this focus in Menke's critique turned out to be structurally anti-pluralist – but it is aimed at individual freedom as critical reflexivity, which may lead to repoliticisation. And second, because it conceptualizes this critical reflexivity, which breaks through the liberal myth of the given, as the result of institutionalized critical subjectification.

Such subjectification is not in contrast to the form of individual rights, which can protect against paternalism. On the contrary, the subjectification through individual rights can work as critical subjectification. Freedom as critique shows that there are subjective preconditions for politicisation: critical subjectivities. Menke, in his demand for a politicisation through the new law, does not take them into account. While Menke is right that subjectification through liberal law constitutes subjects without normative reasons that follow the myth of the given, overcoming such subjectification necessitates an account of how critical subjectification can lead to the subjects' capability to break through the myth of the given and transform both themselves and society. Rather than making the form of individual rights per se the object of legal critique, a differentiation between different individual rights and their effects on individuals and society is necessary. As Jay Bernstein pointed out,

albeit with a different vocabulary,⁴² the practice of claiming rights leads to critical subjectivity – this is the positive, emancipating side of legal subjectification. Thus, law is not only a social system that has depoliticising effects, but it is also a central driver of political change and becoming through critical subjectification. Law, or more precisely critical subjectification through individual rights, is a sphere of the solidification and institutionalisation of repoliticisation through social critique.

The abandonment of the discourse of the new right and the counter-rights, that are caught in the aporia of the old (negative and positive) concepts of freedom, and instead to build a theory of law on the concept of freedom as critique opens up new possibilities: Such ‘reflective liberalism’ allows to ask less radically and more realistically where politics is problematically blocked by the language of rights and its liberal subjectification, and which individual rights are nevertheless helpful and can even, as part of a regime of critical subjectification, help in the critique of subjectification.

V. Conclusion: Institutionalising Transformation

Menke claims that the inhumane treatment of refugees and migrants follows from the atomistic social ontology of liberalism: A society that conceives human beings only as bearers of individual rights, and not as members qua being human, will not care for those individuals who are not sufficiently protected by the current legal regime, such as refugees. The current legal regime does not protect refugees and migrants, because the enjoyment of individual rights is effectively dependent on specific national citizenship – similar to the situation of stateless persons that Arendt already criticized 70 years ago. However, Arendt does not conclude that it is necessary to abandon individual rights in order to create a society based on real membership. On the contrary, with the notion of the right to have rights she demands the universal right to the inclusion into the legal realm, that is, the enjoyment of equal individual rights for everyone, which she imagines could be secured by the United Nations.⁴³

The discussion of Menke’s *Critique of Rights* and the Foucauldian concept of freedom as critique leads to a more nuanced position. Building on Menke’s critique, it is possible to identify the subjectification through individual rights in terms of the “myth of the given” as the fundamental reason for the blockade of politics that prevents a change of politics towards the realisation of the right to have rights. However, Menke’s proposal to radically transform politics by the new right, which is not blocked by individual rights, could lead to the very opposite of the realisation of the rights to have rights. It could lead to the abandonment of rights, especially of minorities that need legal protection such as refugees, through an anti-pluralist and paternalist politicisation. The reflective liberalism that follows from the Foucauldian notion of freedom as critique solves this problem by proposing a critique of subjectification that may open new possibilities for radical transformation without abandoning individual rights altogether. The realisation of the right to have rights, that is, the equal integration of all humans into legal protection, necessitates a radical transformation of ourselves and of our bourgeois and amoralistic liberalism. Individual

⁴² See Jay Bernstein, Rights. <<https://www.politicalconcepts.org/rights-bernstein/>>, accessed 2019-03-01 16:44.

⁴³ Cf. Arendt (footnote 4), 769.

rights are not only part of the problem, but also part of the solution. The subjectification through individual rights does not only constitute the bourgeois “myth of the given”, but it can also lead to the critical subjectivities that form the basis of radical political transformation. Freedom as critique may serve as a starting point for the differentiation between these opposing effects of individual rights.

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